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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOSEPH H. NORWOOD, individually and as representative of a class of citizens;

Respondent,

v.

W.C. BAIN, JR. individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department; and CITY OF SPARTANBURG,

Petitioners.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Order of the Hon. G. Ross Anderson, Jr., United States District Judge, filed July 16, 1996. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Joseph H. Norwood, individually and as a Representative of a class of Citizens,	)	Civil Action No. 7:95-1016-3
Plaintiff,	)	
v.	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
W.C. Bain, Jr., individually and in his official capacity as Director of Public Safety for the City of Spartanburg Police Department and the City of Spartanburg,	)	
Defendants.	)	

The Plaintiff and the class members he represents were involved in a Red Cross fund raising motorcycle rally held on September 11, 1994. Plaintiffs brought suit alleging that their Fourth Amendment rights were violated due to the alleged search, seizure, videotaping, and license check conducted by the Defendants as the class members entered the Piedmont Interstate Fairgrounds. The Plaintiffs also alleged that their First Amendment rights to associate were violated by the Defendants' actions.

During the week of May 20, 1996, this matter was presented to a jury. After fourteen hours of deliberation, the jurors were hopelessly deadlocked. Both sides have agreed to waive their rights to another jury trial. This Court, based on the express stipulation of the parties, now decides the action.

During trial, the Court directed verdict against Plaintiffs on their First Amendment claims. This Court also directed verdict against Plaintiffs on their claims for punitive damages. Those rulings stand. This Court now announces its findings of fact and conclusions of law regarding the remaining claims.

FINDINGS OF FACT

1. The Spartanburg Police Department (hereinafter the "Department"), headed by W.C. Bain, Jr., (hereinafter "Bain"), became involved in the Red Cross Poker Run (hereinafter "Rally") in May, 1994, when the Department was contacted to assist in providing security at the Piedmont Interstate Fairgrounds (hereinafter "Fairgrounds"). The Department was asked by rally organizers to provide off-duty officers.

2. John Poole, one of the co-chairs of the event, approached Captain Doug Horton of the Department sometime after the

initial request for assistance at the Rally and advised Horton to check on an individual named James "Oats" Oatfield, who was a reputed member of the Hell's Angels and A.B.A.T.E., which stands for "A Brotherhood Against Totalitarian Enactments". Poole also asked Horton to check on an outlaw biker group known as the Pagans.

3. Horton then approached a reserve officer of the Department, Carl McKinney, who reported that he had information that there was going to be a confrontation between rival biker gangs at the Rally. McKinney told Horton that his friend had been involved in a biker gang and was concerned for McKinney's safety. This friend also told McKinney that some of the persons involved were called "Penguin Poppers". McKinney testified that his friend asked to remain anonymous, as McKinney's friend was also concerned for his safety. McKinney further testified that his friend indicated that the biker gangs would be unidentifiable at the Rally because the members were going to "drop their colors". To "drop colors" means to conceal one's gang affiliation. "Colors" are the emblems and mode of dress that identify

certain members of biker gangs. The "colors" of a gang member are considered sacred by members of the gang.

4. Horton contacted Lennie Hicks at the South Carolina Criminal Justice Academy. Hicks had taught a course on outlaw biker gangs to officers at the academy. Hicks no longer taught the course on outlaw biker gangs and referred Horton to Lt. Ron Cook of SLED. Cook was the law enforcement expert on intelligence relating to biker gangs. Horton called Cook and described the information he had.

5. Cook informed Horton that James "Oats" Oatfield is one of the oldest living Hell's Angels in the country and was the state coordinator of ABATE. Cook also explained that the term "Penguin" is a derogatory term for Pagans used by the Hell's Angels. Cook further stated that the Hell's Angels and the Pagans were in turf battles over South Carolina. Based on these turf battles, the Hell's Angels and the Pagans enjoy tremendous animosity toward each other. Cook further told Horton that the term "Penguin Popper" is a designation of a rival biker gang whose aim is to cause harm to or death of a Pagan. The term "Penguin Popper" was not a commonly known term, thus lending some credibility to the reports

Horton related. Cook added that a clash between the Pagans and the Hell's Angels could be a very volatile situation. According to Cook, there were a number of motorcycle gangs located throughout South Carolina and including the Spartanburg area. Members of these gangs were reported to be "Penguin Poppers" in order to become full color-wearing members of the Hell's Angels.

6. Cook further informed Horton that there had been a fight between Hell's Angels and Pagans in Myrtle beach in May, 1994. During this fight, several gang members were hospitalized and the Hell's Angels had stripped a Pagan of his colors and shredded them. After this fight, during negotiations by SLED for the return of the colors, a Pagan leader warned law enforcement that there would be retribution against the Hell's Angels.

7. Cook also related to Horton that in the summer of 1994, the Hell's Angels and Pagans had another fight during a charity poker run similar to the Rally. Cook stated that this fight also ended in injury.

8. After speaking with Cook, Horton verified that there were active biker gangs in the Spartanburg area. The Spartanburg

Sheriff's Department reported that many of these groups were under surveillance and asked Horton to forward any information Horton had on these gangs.

9. In early August, 1994, Horton informed Bain for the first time about the Rally scheduled to end at the Fairgrounds and the potential for violent confrontation. Bain was also informed of that a beer permit had been issued for the Rally. Bain was noticeably upset by these revelations. Bain then set a meeting to be held on August 24, 1994 to discuss public safety at the Rally.

10. On August 16, 1994 Poole and other members of the Rally planning committee met with Horton at City Hall. At this time, the committee expressed concern for safety to Horton.

11. On the morning of August 24, 1994, Bain met with Cook and Horton to discuss any new information on biker gangs. Bain then held the meeting for everyone involved in planning the Rally. At this meeting, Bain informed everyone that he and his Department would be responsible for the security. Bain also asked for an update regarding the plans for the Rally. Poole updated the attendees on the status of the Rally.

12. Cook explained to the attendees the information he had regrading the Rally and biker gangs in general. Cook then asked everyone if they had had any contact with any known member of any outlaw biker gang. No one indicated that there was any contact with any outlaw bikers. After the general meeting recessed, however, Poole sought out Horton and Cook and advised those officers that Poole had spoken with James "Oats" Oatfield. Poole related that Oatfield was very interested in the Rally, and would not comment on the Hell's Angels plans regarding the Rally. Poole did not reveal this information in the general meeting, but waited until later because he was concerned that one of the members of the planning committee was a leader of ABATE.

13. Bain then organized a training session for his officers on biker gangs. Officers were informed about biker gangs and their violent propensity.

14. Cook also informed Bain that the most effective preventative measure against biker gang violence was a strong show of force. Based on this information, Bain began arranging for officers to work the Rally. Available officers were told that

they would receive their assignments on the morning of the Rally.

15. In late August or early September, 1994, Cook learned from the Virginia State Police that the Pagans had ordered a mandatory for Saturday, September 10, 1994, the day before the Rally. A "mandatory run" is an order from a leader of a biker gang for the members to ride to a certain location. The destination is not disclosed prior to the run in order to avert unwanted surveillance. There was no direct evidence that the destination of any mandatory run was Spartanburg.

16. Cook learned that a large crowd, including Hell's Angels, were supposed to be going to a Cherokee bike rally and would return by way of the Rally on Sunday. Cook relayed this information to Horton by fax on September 6, 1994. Horton and Cook kept in daily contact during this time.

17. On the night before the Rally, Poole told Horton that the Rally organizers expected as many as 3,000 to 4,000 bikers from Cherokee to converge at the Rally. Poole expressed his concern for adequate Rally safety.

18. Based on the information of his officers and Cook, Bain assigned 75 officers to work the Rally, In addition, Bain

requested, and received approval for, use of the SLED helicopter.

19. On the day of the Rally, Bain assigned his offers to their posts and disclosed the procedure he required. Bain instructed his officers to set up a check point at the "cattle gate" to the Fairground. Officers were instructed to let anyone walk through the gates. Those on motorcycles, however, were to be stopped, have their licenses examined, their licenses and persons videotaped, and their saddle bags and unworn clothing inspected for weapons. Bain's proffered reasons for the actions were to make a video record in case of trouble. Similarly, Bain positioned an officer atop the grandstand with a video camera. This officer was instructed to only video tape the crowd if trouble started.

20. Bain instructed his officers to scan the bikers' possession for weapons using a hand held metal detector. Not surprisingly, the metal detectors were ineffective due to the metal in the motorcycle.

21. The checkpoint was setup at the end of Bishop Street leading into the Fairgrounds and was, by all accounts visible for some distance. Participants were told that they could enter the

Fairgrounds without passing through the checkpoint if the participant parked their motorcycle in the parking lot. The officers followed Bain's instructions regarding the checkpoint, videotaping, and searching. That is, there was a checkpoint established, Plaintiffs were stopped, asked for identification, and videotaped. Some of Plaintiffs' saddle bags and unworn clothing was searched.

22. Cook was stationed at the cattle gate in order to see if he could recognize any biker gang members.

23. Bain's decision was based on the information he received from various sources as well as a legitimate concern for the safety of the Rally participants.

24. Bain was acting as a policy making official of the City of Spartanburg, and therefore, his actions were those of the City.

25. The officers involved in the searching and videotaping procedures were at all times acting under color of state law.

26. Bain and his officers had no information respecting any individual Plaintiff who passed through he checkpoint indicating that that individual was armed or engaged in any unlawful conduct.

27. Bain made no attempt to get a warrant before implementing the checkpoint, search, and videotaping procedure.

CONCLUSIONS OF LAW

Plaintiffs alleged that the action of the Defendants constituted unlawful searches and seizures. Specifically, Plaintiffs alleged that causing Plaintiffs to pass through a checkpoint, searching Plaintiffs' belongings, and videotaping Plaintiffs' persons and drivers' licenses constituted unlawful searches and seizures. Each will be discussed below.

I. Checkpoint

The first step in Fourth Amendment analysis is to determine if there has been a search or a seizure. A search is the seeking out that which is otherwise concealed from view. A seizure of a person whenever the police act so to cause a reasonable person to feel that they were not free to leave. Terry v. Ohio, 392 U.S. 1 (1968). Similarly, a seizure occurs when a vehicle is stopped at a checkpoint. Michigan Department of State Police v. Sitz, 110 S.Ct. 2481 (1990).

Based on the facts presented, the Department seized the Plaintiffs. Simply because the government seized Plaintiffs does not mandate finding for the Plaintiffs. A seizure is lawful if it is reasonable. U.S. Const. amend. IV. Certainly, a warrantless search

or seizure is presumptively unreasonable. This, the burden is on Bain to show that the seizure under these facts was reasonable. Bain has met his burden.

In order for the checkpoint to pass constitutional scrutiny, the state must have a legitimate interest, the checkpoint must promote that state interest advanced, and the checkpoint must be minimally intrusive. U.S. v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989). The ultimate issue of reasonableness is one of balancing the extent to which the seizure intrudes upon individual liberty against the advancement and importance of a state interest. Id.

The legitimate state interest sought to be advanced by Bain was to provide for the public safety of those citizens attending the event at the Fairgrounds by taking steps to minimize the possibility of a violent confrontation between rival outlaw motorcycle gangs.

The checkpoints, given the totality of the circumstances, were minimally intrusive. The checkpoints were clearly visible and the motorcyclists could avoid any questioning by parking their motorcycles and walking into the Fairgrounds. Similarly, pursuant to U.S. v. Oritz, 95 S.Ct. 2585 (1975), the checkpoints minimized any fear and annoyance because all present could see exactly what was occurring in front of them. All who wanted to ride their motorcycles

into the Fairgrounds were stopped. Thus, there was not impermissible singling out of any particular person.

Last, the checkpoint procedure was methodical and systematic in that the identification process was orderly and uniform; there were no more than two definite checkpoint lines; individuals were detained as briefly as possible; and officers were courteous and professional throughout. Accordingly, based on the specific facts here, the checkpoint was lawful.

2. Driver's License Check

As an adjunct to a legitimate traffic checkpoint, police may request an operator's permit for a motor vehicle. In this case, the police requested identification from the motorcyclists pursuant to the legitimate traffic checkpoint. Accordingly, the requesting of identification was lawful.

3. Videotaping

The first element of a search and seizure claim is that there must be a search or seizure. Plaintiff asserts that the videotaping of Plaintiff was an illegal search and seizure of the Plaintiff's identity. There was evidence that Bain videotaped the checkpoint procedures and information from the biker's licenses. There was no evidence of any other videotaping, even though a video camera was stationed on

top of the grandstand in the Fairgrounds. Thus, the only videotaping at issue here was adjunct to the checkpoint.

There can be no search of that which does not have a reasonable expectation of privacy. Those things exposed to public view do not have a reasonable expectation of privacy. See, Katz v. U.S., 389 U.S. 347 (1967). Thus, videotaping in public does not give rise to a cause of action when that videotape is not used for commercial purposes. There simply was no unlawful search or seizure regarding any videotaping activities of Bain.

4. Search of Plaintiff's Closed Containers and Personal Items

In addition to the checkpoint and videotaping, Bain also searched the closed containers and personal items of Plaintiffs. A warrantless search of a vehicle may be valid if based upon probable cause. California v. Acevedo, 500 U.S. 565 (1991). The requirement of probable cause exists even if the search occurs pursuant to a constitutionally valid check point. U.S. v. Oritz, 95 S.Ct. 2585 (1975). The same standard of probable cause would apply to the searches of containers and persons at a roadblock.

There is no dispute that these searches were without a warrant and without individualized probable cause. Even if a search is not accompanied by probable cause or a warrant, consent of the person

searched may make the search lawful. The consent of the person searched must be decided by looking at the totality of circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This Court has considered all of the circumstances here presented including the video tape of the actions of Bain, the method by which Plaintiffs were presented to Bain, and the number of police officers around at the time.

This Court finds that the searches of Plaintiffs violated the Fourth Amendment.

5. Relief

In a 42 U.S.C. § 1983 claim, a prevailing Plaintiff is entitled to damages or an injunction against future violations. A prevailing Plaintiff is entitled to actual, special, punitive or nominal damages. This Court directed a verdict against Plaintiff on its punitive damages claim at trial. That ruling stands. Similarly, Plaintiffs have presented no credible evidence that they suffered any actual or special damages. Thus, the only issue is nominal damages.

While Plaintiffs prevailed, this Court awards NO nominal damages. Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985)("We conclude that once the issue is presented to the jury, it may decide to

award a zero sum or some other small amount as nominal damages." Id. at 338).

As to the injunction, Bain is no longer the Chief of the Spartanburg Department of Public Safety. Similarly, the particular facts presented here make a repeat of this situation highly unlikely. For these reasons, this Court does not issue an injunction.

CONCLUSION

This Court finds that the videotaping, requesting of identification and stopping of Plaintiffs at a checkpoint did not violate the Constitution. This Court finds that the searching of Plaintiffs' persons and belongings violated the Fourth Amendment. This Court finds that while Plaintiffs prevailed, they are entitled to zero nominal damages.

/s/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
UNITED STATES DISTRICT JUDGE

Anderson, SC
July 16, 1996